

STATE OF MICHIGAN
COURT OF APPEALS

DAVID FOX and EVELYNE RUSSELL,

Plaintiffs/Counter-Defendants-
Appellants,

v

CHARTER TOWNSHIP OF OXFORD and
OXFORD TOWNSHIP ZONING BOARD OF
APPEALS,

Defendants/Counter-Plaintiffs-
Appellees.

UNPUBLISHED
October 19, 2006

No. 269805
Oakland Circuit Court
LC No. 2004-059496-AA

Before: Cavanagh, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting summary disposition to defendants pursuant to MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs obtained a building permit for the construction of an exterior stairway and porch from the second level of a home. After the addition was complete, they were cited by the township because the addition did not comply with the side-yard setback ordinance. Plaintiffs requested a variance, but the zoning board of appeals (ZBA) denied the request. In this action, plaintiffs filed a claim of appeal from the ZBA's decision and a separate complaint against defendants. The township filed a counterclaim seeking an injunction to force removal of the porch and stairway. With respect to the appeal of the ZBA's decision, the trial court held that there was competent, material, and substantial sufficient evidence to support the ZBA's denial of the variance.

The trial court subsequently granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that there was no dispute that defendant's ordinance was violated and that plaintiffs failed to demonstrate exceptional circumstances to preclude enforcement of the zoning code.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition because there is a genuine issue of material fact whether there were "exceptional circumstances" such that defendants should be estopped from enforcing its ordinance.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.*, p 120. Summary disposition may be granted under this subrule when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

"An equitable estoppel arises where (1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. . . ." *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575-576; 425 NW2d 180 (1988) (citation and internal quotation marks omitted).

Generally, estoppel will not be applied to preclude a municipality from enforcing its ordinances. *Fass v Highland Park*, 326 Mich 19; 39 NW2d 336 (1949). In *Pittsfield Twp v Malcolm*, 375 Mich 135; 134 NW2d 166 (1965), the Court affirmed the "principle of nonestoppel" in *Fass*, *supra*, but concluded that there were "exceptional circumstances" that warranted denial of the municipality's request for an injunction. Expenditures made in reliance on erroneous approval by municipal officers do not necessarily establish the "exceptional circumstances" that may estop a municipality from enforcing its ordinances. See *Mazo v Detroit*, 9 Mich App 354; 156 NW2d 155 (1968). But contrary to what defendants argue, this Court did not hold in *City of Holland v Manish Enterprises*, 174 Mich App 509; 436 NW2d 398 (1988), that "exceptional circumstances" will only be found if there is no other reasonable use for the property. Rather, that is one circumstance that may be considered. No single factor is in itself decisive of the case; the entire circumstances, viewed together, must present compelling reasons why equity should refuse the request for an injunction. *Pittsfield Twp*, *supra*, p 148.

While it is unfortunate for plaintiffs that the staircase and porch must be altered or removed to comply with the ordinance, we agree with the trial court that the level of exceptional circumstances present in *Pittsfield Township*, *supra*, is not present here. Although plaintiffs argue that the presence of "exceptional circumstances" is an issue that must be decided at trial, the issue properly may be decided by a trial court on a motion for summary disposition. See *City of Center Line v Metro Renewal Corp*, 15 Mich App 545, 546; 166 NW2d 824 (1969).

Plaintiffs also contend that the trial court erred by including in its order language that "[t]his disposes of the last pending claim and closes the case." According to plaintiffs, the order did not dispose of plaintiffs' claim that the ZBA's decision denied them equal protection under the law.

Plaintiffs' complaint does not allege an equal protection claim; it merely challenges the ZBA's denial of a variance on the basis that the denial would violate equal protection. A claim that the ZBA's decision violated the constitution would be a valid basis for a circuit court appeal of that decision. See former MCL 125.293a(1)(a), repealed effective July 1, 2006, but still applicable to this case pursuant to MCL 125.3702(2). In this case, plaintiffs filed a separate appeal of the ZBA's decision and the circuit court affirmed that decision. However, plaintiffs did not raise an equal protection argument in their appeal from the denial of the variance, and the circuit court order affirming the ZBA's decision is not part of this appeal. The present appeal concerns the trial court's decision whether to grant injunctive relief to enforce the ordinance. To the extent that plaintiffs' equal protection argument could be considered relevant to the question

whether the township was entitled to an injunction, it was incumbent on plaintiffs to properly raise the issue in response to defendants' motion for summary disposition. They failed to do so. Even on appeal, plaintiffs do not develop a cogent argument concerning this matter. The trial court did not err in finding that its decision disposed of the last pending claim in the case.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra
/s/ Donald S. Owens